

STATE OF MICHIGAN  
COURT OF APPEALS

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TRUDY MEYER,

Plaintiff-Appellant,

v

MATTHEW ASHBY,

Defendant-Appellee.

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UNPUBLISHED

May 10, 2007

No. 266565

Oakland Circuit Court

LC No. 2005-008244-AV

Before: Smolenski, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Plaintiff appeals by delayed leave granted the circuit court's order affirming the district court's dismissal of her complaint for claim and delivery.<sup>1</sup> We reverse and remand this case to the district court for further proceedings.

I. Basic Facts and Procedure

This case arises out of defendant Matthew Ashby's marriage to plaintiff's daughter, Sarah, in September 2000. During the course of the marriage plaintiff allegedly lent the couple several pieces of personal property, such as furniture and artwork. In September 2003, Sarah filed for divorce in Midland County Circuit Court. According to plaintiff, Sarah informed defendant during the divorce proceedings that plaintiff had an ownership interest in, and sought the return of, the personal property at issue here. In March 2004, plaintiff arranged to pick up the property from defendant, but defendant's counsel subsequently canceled the pick-up.

Defendant contended in the action below that during negotiation to reach a consent judgment, Sarah's attorney told him plaintiff no longer wanted any of the personal property. On July 23, 2004, the Midland County Circuit Court entered a consent judgment of divorce. Defendant further contended that, in light of that concession, he agreed to assume a substantial

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<sup>1</sup> An action seeking return of tangible personal property falls under MCL 600.2920, *Sparling Plastic Indus. v Sparling*, 229 Mich App 704, 713-714; 583 NW2d 232 (1998); § 2920 codified the common law action for replevin. *Whitcraft v Wolfe*, 148 Mich App 40, 44; 384 NW2d 400 (1985). See also MCR 3.105.

portion of the marital debt. The divorce judgment awarded Sarah enumerated items of personal property, and awarded defendant “the balance of the personal property, tangible and intangible currently in his possession as of May 13, 2004 his sole and separate property, free and clear of any claim of right on the part of the Plaintiff, Sarah Mae Ashby, except as set forth in the paragraph immediately preceding this one.”<sup>2</sup>

After the divorce judgment was entered, plaintiff demanded that defendant return certain items of personal property. Defendant refused. On August 12, 2004, plaintiff initiated suit in 52-1 District Court seeking return of certain items. In her complaint, plaintiff alleged that the items were on loan to the couple or were simply left in defendant’s home while visiting and that defendant refused to return the items. In response, defendant claimed several affirmative defenses, including a defense that the district court lacked jurisdiction, and that plaintiff’s claim was barred by a prior adjudication. Defendant took the position that plaintiff’s complaint was nothing more than a collateral attack on the Midland County Circuit Court judgment of divorce, and that the property division contained in that judgment must be deemed conclusive in regard to defendant’s rights to the property.

At a January 18, 2005 hearing, the trial court dismissed with prejudice plaintiff’s complaint for lack of jurisdiction. The trial court stated:

In that consent judgment [of divorce] it lists all the property of the parties. The parties have signed, saying that all property has been disposed of. There has been no setting forth in this Judgment of Divorce that there’s other property that Matthew Ashby, the defendant herein, was holding; that belonged to a third party. The purpose of a—of a Judgment of Divorce is to dispose of all property that came through the marriage. If it did not come in through the marriage it should have been in a statement given in the divorce judgment that the party has been preserved for future litigation. This judgment says, that, further, there has been an exchange of all personal property between the parties.

So, the—the court fails to see that it has any jurisdiction here—that there’s any—that there can be any claim outside of this Judgment of Divorce.

It indicates that the defendant shall have the right to take a copy of this Judgment of Divorce to any peace officer to reclaim the dog and the trailer from Trudy Meyers (sic). So, obviously, Trudy Meyers (sic) was involved in this Judgment of Divorce up in Midland. She is trying to—again, through a back door—and bring another case down in Oakland County. The court finds it has no jurisdiction. This is a Judgment of Divorce. Any action you have must be brought in the County of Midland by opening up this Judgment of Divorce and claiming fraud.

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<sup>2</sup> Defendant was also awarded, among other things, a dog, and a trailer, which were, apparently, at the time of the divorce, in plaintiff’s possession. The divorce judgment provides that defendant “shall have the right to take a copy of this Judgment of Divorce to any peace officer to reclaim the dog and trailer from Trudy Meyers.”

Plaintiff appealed to the circuit court. In that appeal, plaintiff argued the trial court erred in dismissing her complaint on jurisdictional grounds because, contrary to the trial court's ruling, plaintiff could not have raised a claim regarding the property in the divorce case because the Midland County Circuit Court lacked the authority to determine the rights of third parties. Defendant argued that plaintiff was attempting to enlarge the record on appeal by citing materials not presented to the trial court, that plaintiff failed to produce all of the transcripts of the proceedings in the trial court, that plaintiff could have intervened in the divorce proceedings to protect her rights or claim fraud, that the divorce judgment cannot be collaterally attacked, that there was no loan contract between plaintiff and defendant, and that because plaintiff failed to respond to defendant's affirmative defenses, she has effectively admitted that the district court lacked jurisdiction to dispose of the property.

The circuit court denied plaintiff's appeal. In so doing, the court stated that plaintiff should have raised her claim during the divorce proceeding.

Bluntly, as the lower court pointed out, the appellant was actually mentioned in the divorce judgment, but not to claim ownership of property; rather, to return a dog and a trailer, which she has not done and is in violation of a court order at that point in time.

If she had a claim back then, why was no mention of it made in the divorce judgment? .... Also, if there was fraud, as the lower court suggests, then appellant should have attacked the divorce action. I'm not telling her to do it, but that's it. But it has not been done.

Bluntly, the simple fact that appellant is trying to introduce evidence that's not part of the lower court record would be sufficient to deny it and also the fact appellant failed to respond to affirmative defense.

## II. Analysis

On appeal before this Court plaintiff claims, as she did below, that the trial court erred in dismissing her complaint for lack of jurisdiction; that the divorce judgment does not collaterally estop her claim against defendant; and that the trial court's summary dismissal deprived her of due process. Because we reverse the circuit court's determination that the divorce judgment divested the district court of its jurisdiction and remand for further proceedings, there is no need to address plaintiff's collateral estoppel or due process claims.

### A. Standard of Review

This Court reviews de novo questions of a trial court's jurisdiction. *Jeffrey v Rapid American Corp*, 448 Mich 178, 184; 529 NW2d 644, (1995). [Citations omitted.] All documentary evidence is considered, and all factual disputes must be resolved in favor of the nonmoving party for the purposes of determining whether the trial court had jurisdiction. *Id.* Also, we review de novo a circuit court's decision of a district court's dismissal of a case. *First of America Bank v Thompson*, 217 Mich App 581, 583-584; 552 NW2d 516 (1996).

### B. District Court's Jurisdiction Not Divested by Divorce Judgment

A circuit court has no power, in a divorce proceeding, to adjudicate the rights of third parties; an exception exists where the third party allegedly conspires with one of the spouses to deprive the other spouse of an interest in marital property. *Thames v Thames*, 191 Mich App 299, 302; 477 NW2d 496 (1991); *Reed v Reed*, 265 Mich App 131, 157-158; 693 NW2d 825 (2005). Rather, if an agreement arises between the third party and one of the spouses, then the third party has an adequate remedy at law<sup>3</sup> to secure a judgment against the spouse for failure to perform under the agreement. *Yedinak v Yedinak*, 383 Mich 409, 414-415; 175 NW2d 706 (1970). In *Yedinak*, the plaintiff wife filed a complaint for divorce. The defendant husband's brothers sought to join the divorce action to secure a lien on the couple's property. The Court specifically determined that joinder by a third party in a divorce claim was inappropriate:

[J]oinder of parties is appropriate in situations in which their respective rights and obligations arise out of the same contract, transaction, occurrence or like circumstances, and any question of law or fact is common to the claims of them all. . . . Here the alleged rights, if any, of defendant's brothers arise out of an oral agreement by defendant to pay them. The rights and duties of plaintiff and defendant with respect to each other, which are the proper subjects for consideration and determination by the court, under the statutes, in divorce proceedings spring from the marriage covenants and relationship in and to which defendant's brothers had no part whatsoever. Hence, for this reason also, joinder of them in this cause is unthinkable. *Id* at 416.

Similarly, in *Smela v Smela*, 141 Mich App 602, 603-605; 367 NW2d 426 (1985), the parents of a party in a divorce filed a third-party complaint in the divorce proceeding seeking a judgment for money the parents purportedly lent to the couple to purchase the marital home. Although the trial court ruled that the parents had a \$30,000 interest in the home, this Court vacated the judgment, holding that the trial court lacked jurisdiction in a divorce case to adjudicate the rights of third parties and that the parents' remedy was to bring an independent action.

In this case, plaintiff's complaint alleges that an arrangement existed whereby she had lent certain items of personal property to her daughter and former son-in-law and expected a return of the items at some point. Defendant alleges no conspiracy theory in the record, so she cannot have been a party under the fraud exception in *Thames*, *supra*. Further, under *Yedinak*, *supra*, she was barred from being joined, and under *Smela*, *supra*, from intervening, in the divorce proceedings. Her complaint for replevin is the separate action called for by our case law.

The circuit court here also determined that plaintiff's claim should be barred because she "was actually mentioned in the divorce judgment . . . to return a dog and trailer [to defendant]"

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<sup>3</sup> MCL 552.12: Suits to annul or affirm a marriage, or for a divorce, *shall be conducted in the same manner as other suits in courts of equity*; and the court shall have the power to award issues, to decree costs, and to enforce its decrees, as in other cases. [Emphasis added.]

and the district court found that she was “involved” in the divorce because the judgment mentioned her. However, as is evident from *Smela, supra* at 603-605, in which the divorce judgment named the third-party plaintiffs, expressly naming a third party in the judgment of divorce does not defeat the rule that a court hearing a divorce does not have jurisdiction to adjudicate the rights of third parties absent an allegation that a spouse to the divorce fraudulently transferred purported marital property to the third party.

Therefore, the lower courts erred in concluding that the district court lacked jurisdiction in this case because of the prior divorce action.

#### C. Dismissal Inappropriate for Expanding the Record and not Related to Failure to File Transcript

The circuit court also erred in holding that it could dismiss plaintiff’s appeal because plaintiff provided documents to the circuit court that were not before the district court. When a party expands the record on appeal, the proper remedy is to ignore the additional documents,<sup>4</sup> and neither defendant nor the circuit court have cited any authority providing that expanding the record would warrant dismissal of an appeal. See *McCartney v Attorney General*, 231 Mich App 722, 725; 587 NW2d 824 (1998) (holding that this Court need not consider a position or argument when a party fails to provide any authority to support it). Because we ignored all of the documents of either party that were not before the district court, they do not affect our decision. Defendant next argues that the circuit court properly dismissed plaintiff’s appeal for failure to file the full transcript of the October 14, 2004 motion hearing. We disagree that the circuit court dismissed plaintiff’s appeal on this ground. Although the circuit court stated, “Well, you still have a duty to order the entire transcript, that’s the key issue” it never stated that it was dismissing plaintiff’s appeal on this ground.

#### D. Dismissal on Other Grounds

Defendant argues that dismissal with prejudice was warranted and could have been affirmed by the circuit court because plaintiff failed to present any evidence of a contract with defendant, and she failed to respond to defendant’s affirmative defenses. However, these issues were not before the district court when it dismissed plaintiff’s claim. The district court dismissed the case solely because it believed it lacked jurisdiction. Defendant also argues that the district court “held there was no valid contract between [plaintiff] and [defendant].” However, the district court never stated that it was dismissing plaintiff’s claim upon finding plaintiff had no contract. It merely stated that plaintiff alleged that her claim to the property was a separate contract from the divorce, and the court then commented that plaintiff did not have a *written* contract. The court made the statement in the context of summarizing the case and separate from its holding regarding the dismissal. Defendant also argues that dismissal was proper because plaintiff’s allegation of ownership is not proof of ownership, that defendant purchased most of these items, that other family members gave many of the items to him and his former spouse as

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<sup>4</sup> Cf. *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002) (holding that this Court would not consider documentary evidence not part of the record on appeal while otherwise addressing the appeal).

gifts, that plaintiff could only produce receipts showing she purchased three of the items at issue, and that his ex-wife's attorney told him during the divorce proceedings that plaintiff did not want any of these items. However, all factual disputes must be resolved in favor of plaintiff for purposes of determining whether the trial court had jurisdiction, *Jeffrey, supra* at 184.

Because we hold that the circuit court erred in affirming the district court's dismissal, it is unnecessary to address plaintiff's other arguments. We reverse the circuit court and remand this case to the district court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski

/s/ Kurtis T. Wilder

/s/ Brian K. Zahra